

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

Present: - Hon'ble Mr. Justice Subhendu Samanta.

CRA 267 of 1992

**Dilip Halder
Vs.
State of West Bengal & Anr.**

For the appellant	:	Mr. Abhijit Adhya
For the State	:	Mr Narayan Prasad Agarwala, Mr. Pratick Bose
Judgment on	:	11-01-2023

Subhendu Samanta, J.

The instant appeal has been preferred against the order dated 28.7.1992 passed by the Learned Additional Sessions Judge, 4th Court, Howrah convicting the appellant under Section 354 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,000/- in default to undergo further rigorous imprisonment for three months in session trial case no. XVI(I) of 1992.

The brief fact of the prosecution case is that on 8.6.1990 at about 22-30 hours Smt. Latika Dey, wife of Bholanath Dey of Nripendrapally, Police Station Bally lodged an information verbally that the appellant was a tenant under her husband, called their grand daughter (name of victim girl cannot be disclosed) aged about three and half years at

about 3 p.m. to his room and after some time she found her said grand daughter lying asleep in one bed of the accused. At about 3.30 p.m. their sleep was disturbed due to alarm raised by victim girl who come back to his room and removed her Jongia and report that maternal uncle had pushed his male organ into her private parts and some liquid substance like cough was lying there. Bhola Nath Dey took victim girl to Dr. N.N. Halder and according to his advice, removed her to Howrah General Hospital. The Medical Officer on duty asked Bholanath to inform the local Police Station first, so he come back along with the victim girl. By that time police officer had already came to their house and took all including the informant and the appellant to Thana, thereafter, Bally P.S. case no.165 dated 8.6.1990 under Section 376 of the Indian Penal Code was started.

Charge was framed against the appellant under Section 376 of the Indian Penal Code wherein the accused pleaded not guilty and claimed to be tried consequently the trial initiates.

The prosecution examined sixteen witnesses to substantiate the charge.

The accused examined U/s 313 Code of Criminal Procedure

The accused also produced three witnesses in his favour.

After hearing the prosecution and the defence learned Trial Judge found the accused guilty in respect of an offence punishable under Section 354 of the Indian Penal Code and convicted him to under go rigorous imprisonment for two years and to pay fine of Rs.1000/-in default to undergo further rigorous imprisonment for two months. Hence this appeal.

Learned advocate appearing on behalf of the appellant submitted before this Court that the impugned order of sentence and conviction passed by the Learned Trial Court below suffers illegality and impropriety.

Though the charge has been framed under Section 376 of the Indian Penal Code but the Trial Judge wrongly convicted the appellant under Section 354 of Indian Penal code. He further pointed out that the statement of P.Ws does not support the prosecution case in that score learned Sessions Judge must have dismissed the case and acquitted the present appellant.

He further pointed out that the opinion of doctor regarding the commission of alleged offence of rape upon the minor girl could not be substantiated, thus, the appellant deserves to be acquitted. He further argued that there is delay in lodging the FIR which was not explained.

There are disputes between the landlord and the tenant in between the accused and the grand father of the victim girl for which the appellant was falsely implicated in this case. He again argued that from the statement of the P.Ws it would be revealed that they have created new story day by day beyond the FIR case. The police never seized the wearing apparels (Jongia) of the victim girl and was not sent to the forensic test.

Both the medical reports of two doctors P.W. 3 and P.W. 13 proved negative. The doctor (P.W.3) who examined the victim did not found any sign of penetration, laceration or bleeding. The doctor of Howrah hospital (P.W. 3) also did not opine that she was raped. More surprisingly, the mother of the victim (P.W. 10) did not check her daughter's vaginal canal on hearing the incident, which is quite unnatural. The report of the doctor

indicates that hymen was intact, vestibules was congested probably due to vaginitis, no injuries was seen, no bleeding was seen, there was also no swelling. This being the observation and the clinical report of the doctor; this can be assumed that nothing has happened upon the victim as alleged. He further argued that the victim was examined as P.W. 2. Through and careful reading of the statement of P.W. 2 would be revealed that she has been tutored.

It is further submission of the appellant that the case has not been proved beyond reasonable doubt and the appellant being a honest family member living with his family may be given benefit of doubt and acquitted from this case.

Learned advocate for the State submitted before this Court that the alleged incident happened in the year of 1990 before the pass of the POCSO Act. The prosecution has produced 16 witnesses including the victim herself. All the witnesses supported the prosecution case. There may have some discrepancy regarding the dictation of the fact in question but the discrepancy appear due to human intelligence difference and lapse of time. He argued that the sexual assault has sufficiently proved as per version of the P.W. 2(victim herself). He again argued that the learned Court below was justified in passing the sentence and convicting the appellant under Section 354 of the Indian Penal Code. Thus, he prayed for dismissal of the appeal.

Heard the learned advocate perused the evidences, it is true that the fact of commission of rape was negated in this case by the evidence of the doctors. Let me consider whether learned Session Judge is justified in

passing the order of conviction under Section 354 IPC against the appellant. In this particular case, it is claimed on behalf of the appellant that there are land lord tenant dispute between the grand father of the victim and the appellant for which the appellant was falsely implicated in this case. From the four corner of the case record no material was found regarding the dispute of the land lord tenant dispute between them. Moreover three witnesses were examined on behalf of the defence. They also did not state regarding any dispute of tenancy. Thus, the plea and the dispute of land lord and tenant by the appellant is not substantiated at all.

This is a case wherein the charge was framed under |Section 376 of the Indian Penal Code against the appellant. During the trial the Session Judge is of view that charge U/s 376 IPC has not sufficiently proved as the penetration could not be proved by the opinion of doctors. Apart from the medical opinions there are several ingredients regarding the sexual assault inflicted upon the victim by the appellant. It further appears that Learned Session Judge has come to a conclusion that the assault upon the victim girl regarding outraging her modesty has been sufficiently proved. In considering the evidences on record and also considering the cross-examination conducted by the defence, I am of a view that learned Session Judge is not in faulty to observe that the offence under Section 354 IPC has actually happened/committed by the appellant.

Considering the entire aspect, I find no justification to interfere with the impugned judgment passed by the learned Sessions Judge. Hence the instant appeal has got no merit to entertain and it is liable to be dismissed.

In conclusion criminal appeal is dismissed.

The impugned order of conviction and sentence passed by the learned Sessions Judge against the appellant in session trial No. XVI(I) of 1992 is hereby affirmed.

Appellant is on bail. He is directed to surrender before the Additional Sessions Judge, 4th Court, Howrah to serve out the sentence within fifteen days from this day; failing which learned Court below is at liberty to issue warrant of arrest against the appellant for compliance of this order.

Let the copy of this order be sent down to the learned Court below for his information and compliance.

Criminal Appeal is disposed of.

Connected pending CRAN applications, if any, are consequently disposed of.

Order of suspension of sentence, if any, passed by this Court during the pendency of the instant criminal Appeal is hereby also vacated.

Urgent Photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Subhendu Samanta, J.)